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No. 9992

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

CHARLES EVAN FOWLER,

Appellant,

VS.

CALIFORNIA TOLL-BRIDGE AUTHORITY,

Appellee.

Appeal from Order of United States District Court
Dismissing Action.

BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

The United States District Court dismissed the action herein for want of jurisdiction of the parties hereto. Appellant claims that the District Court did have jurisdiction of said parties on the ground of diversity of citizenship. Jurisdiction of the United States District Court for the Northern District of California is based upon Title 28, Section 41, subsection 1 of the United States Code Annotated.

Appellate jurisdiction of this Court is predicated upon United States Code Annotated, Title 28, Section 225.

The amended complaint herein, paragraph I thereof (Tr. of Record, p. 2) alleges that the defendant was created by the Statutes of the State of California, Statutes of 1929, page 1489 and amendments thereto, Act 956, General Laws. Said statute created the defendant as a corporation. Plaintiff further alleges in said paragraph that he is a resident and citizen of the State of Louisiana; that the matter in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars (\$3,000.00).

STATEMENT OF THE CASE.

Plaintiff, a citizen of the State of Louisiana, sued the California Toll Bridge Authority, a corporation, a citizen of the State of California, in the United States District Court, in and for the Northern District of California.

In his amended complaint plaintiff alleges that he prepared certain designs and estimates for a bridge across San Francisco Bay from the City and County of San Francisco, to the City of Oakland, County of Alameda; that plaintiff is the sole owner of said plans and specifications; that the defendant appropriated and used the plans so prepared by the plaintiff without his consent and against his will; that defendant used said plans and designs to construct the present bridge across San Francisco Bay from San Francisco to Oakland; that by reason of said facts defendant became indebted to plaintiff to the extent of 3% of

\$75,000,000.00, the cost of the bridge, which he alleges is the reasonable value of said plans, designs and estimates so appropriated by the defendant and which he claims is the amount of damages he suffered on account of the said use and appropriation.

To this amended complaint the defendant filed a motion to dismiss on several grounds. The main ground, and the one on which the lower Court granted said motion, was that there was no diversity of citizenship between plaintiff and defendant, because the defendant was in reality the State of California and hence not a citizen of California (*Postal Telegraph Cable Co. v. Alabama*, 155 U. S. 482, 39 Law. Ed. 231), and that, therefore, the United States District Court had no jurisdiction over the parties to this action.

It is appellant's contention that the California Toll Bridge Authority is a separate entity from the State of California; that it is a corporation organized and existing under and by virtue of the laws of the State of California and hence a citizen of California, and that, therefore, there was a diversity of citizenship under Title 28, Section 41, subsection 1 of the United States Code Annotated, and the Court had jurisdiction of the parties hereto.

SPECIFICATION OF ERRORS.

1. The District Court erred in its decision holding that there was no diversity of citizenship between the parties hereto.

2. The District Court erred in holding that the defendant was in reality the State of California and not a separate entity.

3. The District Court erred in holding that it did not have jurisdiction of the parties and the subject matter of this action.

ARGUMENT.

The California Toll Bridge Authority was created by an act of the legislature of the State of California.

California Statutes of 1929, page 1489, Act 956,
Deering's General Laws of the State of California.

Section 3 of said Act provides that the California Toll Bridge Authority may sue and be sued in its own name. Section 4 provides that the Authority shall authorize and direct the Department of Public Works of the state to build toll bridges and to pay for the same out of any fund or funds provided, or made available by this Act.

Section 5 provides that the revenue bonds authorized for the acquisition, or construction of a toll bridge, shall be issued in the name of the California Toll Bridge Authority and shall constitute obligations only of California Toll Bridge Authority and shall be identified as toll bridge bonds and shall contain a recital on the face thereof that the payment or redemption of said bonds and the payment of the interest

thereon, is secured by a direct and exclusive charge and lien upon the trust and other revenue of any nature whatever received from the operation of the particular toll bridge, for the acquisition or construction of which the bonds are issued and that neither the payment of the principal, or any part thereof, or any interest thereon, constitutes a debt, liability or obligation of the State of California.

Section 6 provides that the Authority may raise funds for the construction of a bridge from revenue bonds, which it may sell from time to time in such amounts as may be deemed necessary in its judgment.

Section 10 of said Act provides that the bonds issued under the provisions of the Act shall not constitute, or be a debt, liability, or obligation of the state, and that the payment of both principal and interest of all such bonds shall be secured only by the trust, or other revenue collected from the particular toll bridge, for which such bonds were issued, and other revenues and interests thereon, and sinking funds created therefrom received by the California Toll Bridge Authority, and shall be paid from such trust or revenue.

The Supreme Court of the State of California, in the case of *California Toll Bridge Authority v. Wentworth*, 212 Cal. 298, 298 Pac. 485, held that the bonds proposed to be issued by said Authority, do not constitute debts of the state.

A situation directly comparable to the case here involved was before the District Court of Pennsylvania, in the case of *Hunkin-Conkey Construction Co. v.*

Pennsylvania Turnpike Commission, 34 Fed. Supp. 26 (1940). In that case the plaintiff, an Ohio corporation, brought an action in the Federal Court in Pennsylvania for a declaratory judgment against the Pennsylvania Turnpike Commission, the complaint alleging that the plaintiff and defendant were residents and citizens of different states. The complaint further alleged that the plaintiff and the defendant entered into a contract for the construction of a tunnel, which was part of the Pennsylvania Turnpike highway between Pittsburgh and Harrisburg, Pennsylvania and that a controversy had arisen over the terms of the contract which the plaintiff asked the Court to decide. The defendant moved to dismiss the complaint upon the ground that the Court was without jurisdiction under the provisions of the United States Code to therein determine the controversy on the ground that there was no diversity of citizenship, alleging that the Commission was in reality the State of Pennsylvania and therefore not a citizen. The Pennsylvania Turnpike Commission was created by the legislature of the State of Pennsylvania. The Act creating the Commission provided:

“That there is hereby created a Commission to be known as “The Pennsylvania Turnpike Commission” and by that name the Commission may sue and be sued. * * * The Commission is hereby constituted an instrumentality of the commonwealth and the exercise by the Commission of the powers conferred by this Act in the construction, operation and maintenance of the turnpike, shall be deemed to be an essential governmental function of the commonwealth.”

The Court, in deciding that the Pennsylvania Turnpike Commission was a separate entity from the State of Pennsylvania and hence a citizen of that state, stated:

“This provision, if taken alone, sheds light upon the question of whether or not the Commission is in fact the alter ego of the State. However, the other provisions of the act, when considered in conjunction with this section, clearly indicate that the Commission is distinct and separate from the State and is in reality a citizen thereof. The act provides that the entire cost of the turnpike shall be paid in the first instance from a fund which is to be raised by the issuance and sale of bonds, and that the ‘turnpike revenue bonds issued under the provisions of this act shall not be deemed to be a debt of the Commonwealth or a pledge of the faith and credit of the Commonwealth, but such bonds shall be payable exclusively from the fund herein provided therefor from tolls’, section 2, 36 P.S.Pa. 652b; that the Commission shall have the power to enter into contracts, take title to property, employ engineers, architects, inspectors, and attorneys and such other employees ‘as may be necessary in its judgment, and fix their compensation’, #4 (subject to the proviso that all contracts and agreements relating to the construction of the turnpike must be approved by the Department of Highways and the construction shall be under the supervision of the Department of Highways); that, upon completion of the turnpike, the Commission shall fix the amount of the tolls and employ men to collect them and provide for the maintenance of the turnpike; that, upon retire-

ment of the bonds or provision therefor, the Commission shall be dissolved and the turnpike shall become a part of the system of state highways.

From the provisions of the act, as above outlined, it is clear that the Commonwealth of Pennsylvania has so divorced the defendant Commission from the State that this action is one against a legal entity distinct from the State, and the State itself is only indirectly interested in the turnpike.”

It will be noted that the Act of the Pennsylvania Legislature creating the Pennsylvania Turnpike Commission is almost identical with the Act of the Legislature of the State of California creating the California Toll Bridge Authority.

Other cases holding that public corporations such as the California Toll Bridge Authority are separate entities from the state, or government creating them, are the following:

State of Missouri v. Homestead Life Assoc., 90 Fed. (2d) 543.

We quote from page 548:

“Under the Missouri laws the superintendent of the insurance department, is, we think an entity distinct from the state, with power to sue and be sued. The State in the instant action has not made itself ‘an active agent’ and has not ‘assumed responsibility’.

The Missouri Statutes disclaim responsibility in actions of the character of that here involved. They make the officer of the State the active agent * * *. He sues for and recovers in his own name.

Any judgment would be paid to him, and it is not until he collects the judgment that he makes payment to the State Treasurer. * * * The State has divorced itself from the litigation, which the Superintendent of the Insurance Department may conduct. Its position is comparable to that of the beneficiary of an express trust, whose citizenship has no bearing on the jurisdiction of a Federal Court, the Court not looking beyond the citizenship of the trustee, who is the party litigant. The mere fact that the State has a beneficial interest in the ultimate recovery does not make it a party."

In the case of *Sloan Shipyard's Corporation v. United States Shipping Board Emergency Fleet Corporation*, 258 U. S. 549, 66 L. Ed. 762, the Supreme Court held that the corporation was not entitled to the sovereign's immunity from suit brought to compel the rescission of a contract allegedly induced by duress. Likewise, federal corporations have been held liable for damages for actions in tort. *American Cotton Oil Co. v. United States Fleet Corporation*, 270 Fed. 296.

In the case of *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U. S. 381, 86 L. Ed. 784, a suit for damages for negligence in failing properly to feed livestock entrusted to an agency of the Reconstruction Finance Corporation, to-wit, a Regional Agricultural Credit Corporation, was allowed. This was based on the theory that federal agencies or instrumentalities do not acquire the Government's immunity from suit merely because they do its work and that the mere creation of a federal corporation by

Congress, does not of itself confer upon such corporation legal immunity from suit, even if the conventional "to sue and be sued" clause is omitted in the enumeration of the corporation's powers and functions.

In the recent case of *Reconstruction Finance Corp. v. Minehan Corporation*, 312 U. S. 81, 85 L. Ed. 595, it was held that the Reconstruction Finance Corporation must pay costs when it loses a suit. The Court, speaking through Mr. Chief Justice Hughes, stated:

"The Reconstruction Finance Corporation is a corporate agency of the Government, which is its sole stockholder. It is managed by a Board of Directors appointed by the President, by and with the advice and consent of the Senate. The corporation has wide powers and conducts financial operations on a vast scale. While, as it acts as a governmental agency in performing its functions, still its transactions are akin to those of private enterprise and the mere fact that it is an agency of the Government does not extend to it the immunity of the sovereign. Congress has expressly provided that it shall have power to sue and be sued. There is nothing in the statutes governing its transactions which suggests any intention of Congress that in suing and being sued the corporation should not be subject to the ordinary incident of unsuccessful litigation, in being liable for the costs which might properly be awarded against a private party in a similar case."

Appellant respectfully contends that the Legislature of the State of California in creating the California Toll Bridge Authority, created it as a cor-

poration and a separate entity from the State of California. The decisions we have cited interpreting similar statutes in cases of similar public corporations we respectfully contend support our contention. We also contend that the Federal Court decisions we have cited show that the trend of the law is to hold that governmental corporations, whose funds are distinct from the Government, are separate entities from the governments they represent. If that be so, then the California Toll Bridge Authority is a California corporation and hence a citizen of the State of California (*Barrow Steamship Co. v. Kane*, 170 U. S. 100, 18 S. Ct. 526, 42 L. Ed. 964), and, therefore, there was a diversity of citizenship between the plaintiff and the defendant and hence the Federal Court had jurisdiction of the parties to this action.

Dated, San Francisco,
January 16, 1942.

Respectfully submitted,

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